United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1353

To be argued by
LEON R. PORT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-1353

UNITED STATES OF AMERICA,

Appellee,

- against -

FRANK J. MC KIBBIN and
ROBERT L. DI GREGORIO,

Appellants.

On Appeal from U. S. District Court Eastern District

BRIEF FOR APPELLANT MC KIBBIN + APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA

- against -

FRANK J. MC KIBBIN
ROBERT L. DI GREGORIO,

Defendants.
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BRIEF FOR APPELLANT

FACTS

FRANK J. MC KIBBIN was arrested and charged by the U.S. Government pursuant to Indictment #73 CR 523; that on and between May 1st, 1972 and August 9th, 1972, the defendant Mc Kibbin did violate U.S. Code, Title 18, Sec. 891 (7) in that he allegedly attempted to collect by extortionate means from one ARAM CARAPETYAN, and was likewise indicted in the second count of the Indictment on a similar charge in connection with one CARL GROSS.

The matter was brought to trial on November 12th, 13th, 14th and 15th, 1973, at which time the jury found the defendant Mc Kibbin not guilty on the second count of the Indictment and found him guilty on the first count of the Indictment, together with his co-defendant, ROBERT L. DI GREGORIO.

The basic gravamen of the complaint was that sometime in July of 1971 the defendant Mc Kibbin loaned $100.00 to ARAM CARAPETYAN; the said Carapetyan repaid this loan by payments of $5.00 per week for approximately twenty payments, up to the month of November, 1971. Carapetyan then stated that in November of 1971 Mc Kibbin advised him that because of certain non-payments of interest, the loan had increased to $150.00 and payment thereafter would then be $10.00 per week, and he thereafter made payments in that amount.

He further stated that in March of 1972, he was taken from the car service wherein he was employed to a locksmith's shop adjoining, and that in said locksmith's shop, in the presence of the owner of said shop, a man by the name of "Jack", the defendant Mc Kibbin struck Carapetyan, threatened him with other and worse beatings by other people, and made demands that the loan be increased to $450.00 and that payments thereof would be increased to $20.00 per week. Carapetyan further stated that in July of 1972, after making some payments of $20.00 a week, the loan had then become $900.00 and the payments were $25.00 per week. Carapetyan then stated that in that month of July, 1972, he went to the FBI

and reported the incident.

However, he admittedly did not report to the FBI any of the physical threats or beatings allegedly made in the presence of "Jack".

He then stated that in August of 1972 he was met on the street by the two defendants and an appointment was made for the following day at a place near the car service. He testified that on the following day when he met with the two defendants he was equipped with a transmitter and had been briefed by the FBI as to the use of the transmitter and the conversations he was to engage in with the defendants. He stated that on August 8th a subsequent meeting was had with the defendants, during which time he spoke first to the defendant Di Gregorio and, thereafter, with Mc Kibbin, while wearing the transmitter; that the conversation with Mc Kibbin continued until it was terminated by members of the FBI.

Carapetyan testified that he had never advised the FBI at any time of the alleged incidents where he was beaten and threatened in the presence of "Jack", and, thereafter, did not advise any of the U.S. Attorneys assigned to the case, nor did he testify to that effect before the Grand Jury. He stated that the first time he

had revealed any such information was approximately one week before the trial, at which time he then said the incident took place and that the said "Jack" was a witness thereto.

Carapetyan also testified at the trial to having seen the defendant Mc Kibbin in a car with another party. Said party never testified at the trial and was identified as another driver for the car service. Karapetyan testified that he saw the defendant driving said car and striking this other party who was known as Martin "Shuffles" Katcher.

On or about November 20th, 1973, the attorney for defendant Mc Kibbin located "Jack" Levine and took a formal statement from him. Subsequent to that statement, a motion was made for a new trial on the basis of newly discovered evidence to the effect that the said "Jack" Levine was the "Jack" referred to by Carapetyan at the trial. The said "Jack" Levine denied completely the allegations made by Carapetyan that he had been assaulted, threatened and struck in Mr. Levine's presence. Mr. Levine also stated that he knew the said Carapetyan more than just casually; that, in fact, they had filed a certificate of doing business together, that Carapetyan knew Levine's

first and last name and that Carapetyan knew Levine's unlisted telephone number and address.

A motion was made for a new trial based on this newly discovered evidence. After a hearing at which Jack Levine testified, Mr. Justice Mishler denied the motion.

This is an appeal taken from the verdict as being against the weight of evidence. Further, we are appealing from the admission of prejudicial testimony, to wit; testimony concerning an alleged assault of one Martin Katcher. We are appealing from the denial of the mtion for a new trial after the discovery of Jack Levine and his testimony which directly contradicted that of the complaining witness.

QUESTIONS INVOLVED

1. Did the Court err in permitting the testimony of Aram Carapetyan concerning an alleged assault that he allegedly witnessed being committed by the defendant Mc Kibbin?

2. Did the Court err in denying the motion by the defendant Mc Kibbin for a new trial based upon newly discovered evidence, to wit; the testimony of Jack Levine?

3. In the event that the testimony of Carapetyan is stricken insofar as the alleged assault referred to in Question 1 above, in view of the testimony of Jack Levine would there be sufficient evidence to convict?

4. Did the attorney for Frank Mc Kibbin exercise due diligence in locating Jack Levine who might discredit the testimony of Aram Carpetyan?

POINT I

THE COURT ERRED IN ADMITTING TESTIMONY OF ARAM CARPETYAN CONCERNING AN ALLEGED ASSAULT ON ANOTHER WHEN THAT ALLEGED ASSAULT WAS NOT CLEARLY RELATED TO THE CRIME, NOR WAS IT COMMITTED IN FRONT OF CARPETYAN.

Much of the flavor and content of this case may be seen and felt by the comments of the Court on January 18th, 1974, at which time a motion was being heard for a new trial on newly discovered evidence. The Court, in discussing the matter, indicated that, to its recollection, the element of extortionate threats upon a complainant was bulwarked by two specific facts: first, that testimony was allowed into evidence indicating that the defendant Mc Kibbin had struck a 72 year old male and that this act was viewed by the complaining witness, and, secondly, that this complaining witness himself alleged that he was assaulted in the presence of a third party in the store of that third party.

Later in this brief we will take up the testimony of that third party, when he was found by the defendant's attorney. At this point we ask the Court to consider the circumstances that permitted the admission of this testimony by Aram Carpetyan about the alleged assault on a 72 year old male identified as Martin Katcher. The Court in discussing the matter,

(See Page 33 of the minutes of the January 18th hearing, stated the following:

> "The Court: That's the weakest part of this motion. If they said to me at that time we would like the opportunity to find Jack Levine, go make your investigation, report back to me. I may adjourn it for another day. If I feel that a man was convicted on testimony that might go the other way, the entire case was in -- I am inclined to giving him a new trial. This defendant was charged with extortionate means and mind you, as I say, the one bit of evidence aside from this that got in on violence, which is what convinces the jury, why don't you take a vacation, I'll kill you, that was all testimony. People use that language. But how do you get a conviction by the physical act. The jury believes that that's it. Now, one physical act that troubles me when it went in, if objection was made, I may have kept it out --"

The Court was referring to this very incident regarding Marty Katcher. I viewed the minutes and called the Court's secretary to advise that we had in fact objected, and objected strenuously, to the admission of evidence concerning the said Marty Katcher. These objections which we called to the Court's attention start on Page 101 of the minutes and continue through to Page 107.

Harper v. U.S., US 239 F 2d 945, 99 U.S. App. DC 324 C.A.D.C. 1957 states that "Evidence to prove mere criminal disposition is inadmissible because of the likelihood that it will weigh too heavily with

the jury." U.S. v. Odom, D.C. Pa 1972, 348 F. Supp. 889, affirmed 475 F 2d 1397 stated "One test for gounds for new trial is whether the newly discovered evidence would properly lead to an acquittal on retrial."

Unless it can be established that Aram Carpetyan"s testimony about Marty Katcher was part and parcel of similar offenses, the Courts have held that simply saying that a witness knew of or witnesses criminal acts is absolutely inadmissible because of the prejudice to a jury that would result. Nothing could be more prejudicial than testimony which was admitted concerning the witness's view of an assault on Marty Katcher.

Mr. Katcher was a 72 year old man whose wife was so critically ill that the Government hestitated to contact him, and it made all others reluctant to bring him into this matter because of possible permanent damage that would result to his critically ill wife. Mr. Carapetyan was able to testify that he saw this defendant, Frank Mc Kibbin, strike this 72 year old man, claiming that Katcher was in Mc Kibbin's car and that Mc Kibbin struck Katcher while Mc Kibbin was driving the car and Katcher was a passenger therein. On further and direct examination, Carapetyan indicated that the cars were approaching from opposite directions

and that the cars passed each other while each was in motion.

Under cross-examination, on page 197 of the minutes, Mr. Carapetyan was asked:

"Q. You're sure you saw a blow?

A. I have seen - yes, at least I have seen one. Let's put it that way.

Q. You saw at least one?

A. But I cannot say exactly what happened after. I cannot say what happened before and I cannot say how many times Marty was hit.

Q. Well, was there any -- did the car swerve at all, Mr. Carapetyn, when he punched Marty with his right hand while holding the steering wheel with the left?

A. Yes.

Q. That you remember?

A. That I remember.

Q. It kind of swerved?

A. A little bit.

Q. Did it come close to your car?

A. No, that close, but just slightly.

Q. It swerved a little?

A. A little, very little.

Q. Then it was out of sight and you were on your way?

A. That's right."

Furthermore, unless Mc Kibbin knew that Carapetyan was watching, then what he allegedly did to Katcher would not have been for Carapetyan's benefit and could not have been any part of a plan to intimidate Carapetyan.

When proof of an assertedly similar offense is tendered to establish necessary intent, the other offense proved must include the essential physical elements of the offense charged and these physical elements, but not the mental ingredients of the offense, must be clearly shown by competent evidence.

Nothing in Carapetyan's testimony indicates what the circumstances were in connection with the car, whether the blow was struck at an angle, whether the blow was full face, or whether it was part of any crime whatsoever. The incident is so remote from the crime with which Mc Kibbin is charged that no reason for its admission is justified. The only purpose it served was to indicate that Mc Kibbin would strike an old man, without any of the factors being admitted to evidence as to the circumstances of that occurrence or the facts behind it. Was this an act of anger? An act of anger? Was it kidding around? Was it provoked? None of these

questions were answered by any evidence whatsoever. Assuming such an act even occurred, we do not know what the basis for it could be. In view of the later revelations concerning the assault allegedly in the presence of Jack Levine, which Mr. Levine denies, it is very clearly possible that this entire incident may be untrue. If we are to believe Mr. Levine, making untrue statements is not foreign to Mr. Carapetyan's make-up.

The admission of the testimony about Katcher was clearly prejudicial and does not fall within the purview of "Legitimate evidentiary purpose". U.S. v. Broadway, 477 Fed 2d 991 (1973) states 'But recognition of the legitimate evidentiary purpose served by proof of similar crimes simply underscores the flaw in the proof below. We have had occasion to hold that proof of similar offenses in a situation involving identification must "... be clear and that evidence of a vague and uncertain character regarding such an alleged offense should not be admitted."

Therefore, the admission by the Court of testimony about Katcher was in error and, in view of the further discovery of the testimony of Jack Levine as hereinafter stated, would clearly indicate that it

contributed mightily to the guilty verdict.

POINT II

THE ATTORNEY FOR DEFENDANT MC KIBBIN EXERCISED DUE DILIGENCE IN LOCATING "JACK" LEVINE.

The Court, in its decision denying a new trial, indicated that there was some lack of due diligence on the part of the defendant through his attorney. If there was such a lack of due diligence, the attorney made one unwarranted assumption; that the description of "Jack" and the testimony of Carapetyan, both in direct and cross-examination, in no way indicated the relationship which existed between them and gave rise to no assumption that Carapetyan knew "Jack" more intimately than merely as a person with a business directly next to the car service.

The description of the next door neighbor to the car service, a locksmith known as "Jack", gave no indication to counsel that Carapetyan knew this man outside of that sore, that he entered into a business with him, that he knew his last name, that he knew his unlisted telephone number or that he knew his home address. "Jack" could have been a nickname for Jacob or John, and once the attorney found that the store was closed, the

probability of locating the former owner seemed remote. It was only by accident, and by a queer accident at that, that we found "Jack" Levine and discovered the further information concerning their relationship.

An attorney-at-law does not have the facilities available to him that are available to the prosecuting attorneys who have at their disposal all forms of police and governmental agencies. In spite of this, and possibly because of the experience of Mc Kibbin's attorney in the prosecutorial field, investigations were made, witnesses were sought and information concerning those witnesses was requested by defendant's counsel. It was at the election of the U.S. Attorney that information concerning witnesses was withheld as being evidentiary in nature. In a letter to counsel (Appellant's Exhibit "1"), in the very first paragraph, the U.S. Attorney states:

> "I would like to note that the Government still firmly objects to your request for discovery of its witness' names."

With that in mind, an attempt was made to speak to witnesses. Defendant's counsel attempted to speak to the wife of one of the complaining witnesses. He left a message for her and spoke to her, asking her to contact the U.S. Attorney to be assured that speaking to counsel

was not improper. However, after that the witness chose not to speak to defendant's attorney.

During the course of an attempt to attack the credibility and mental capacity of Carapetyan, witnesses were produced who submitted affidavits indicating that they were co-workers of Carapetyan and possible witnesses to facts concerning the relationship with defendant Mc Kibbin and others. In the questioning of one Harold Koenig, the U.S. Attorney made a statement pointing out to the Court and the jury that the government witness saw defendant Mc Kibbin. The Court (Page 406) stated:

> "There is nothing wrong in a litigant, a part to any litigation interviewing any witness, prospective witness."

Defendant's counsel stated (Page 403) that throughout the entire peiod of time he had taken several statements from several witnesses. Defendant's counsel had offered a copy of a statement to the U.S. Attorney wherein the said Harold Koenig admitted paying a loan with usurious rate of interest, but denied that there were any extortionate threats ever directed to this witness.

Defendant's counsel interviewed this witness, knowing him to be a government witness and knowing that his testimony might be adverse to the defendant. Counsel

attempted to interview the wife of a complaining witness, knowing that her testimony might be damaging to the defendant. Counsel interviewed other witnesses, knowing their testimony could be damaging to the defendant.

The reason counsel did not interview "Jack" Levine was based solely upon the fact that Mr. Levine's name, address and telephone number were never supplied to defendant's counsel. Counsel freely admits that he made one assumption based upon his own experience, which, in the light of further information, proved to be an incorrect assumption. He assumed that a person with a business adjacent to the place of one's employment, whether that be a locksmith's shop or a grocery or a restaurant, is usually known to those customers and neighbors on a first name basis and a first name basis only.

When Carapetyan referred to "Jack", the locksmith next to the car service, at that point in time there was nothing in that description that would have given rise to an immediate awareness that "Jack" was a person known to the witness as a partner in a business (Appellant's Exhibit "2"), a person whose telephone number and address were known to the witness even though they were not listed in a public phone book, and a person with whom he was in

continuous contact even after the car service had moved its location and even after the locksmith store had closed.

The government had far more opportunity through its U.S. Attorneys and its FBI agents to question Carapetyan. They were not bound by time, by rules of evidence, by the possibility of affectuating a mistrial or by any wrongful act in questioning techniques. They were in a unique position to ascertain the whereabouts, the testimony and the pertinency of the testimony of a supposed eye witness to the only assault of which Carapetyan complained. The Judge, in the January 18th hearing, pointed this out when he recalled that the governement had been put on notice that Carapetyan's testimony would be attacked by pre-trial motions and allegations. The Court stated (Page 41) as follows:

> "What I can't quite understand is when the defendants make the kind of charges against the Government witness that they make, that he was unstable, schizophrenic and all that kind of nonsense, no proof of it whatsoever in the trial. I think charitably I might say Mr. Carapetyn acted like the traditional artist that he probably is, musician, and probably didn't deal with realities as a normal man would, but having made all these charges, then having learned a week now, it turns out, before the trial, that he's ready to testify as to some new incident

> that bears heavily on the guilt of the defendant, the Government makes no attempt to really find him. That's another thing that really bothered me."

The Court, in discussing the matter (Page 40), states:

> "I know it's not in the indictment and technically you didn't have to but still it bears on whether the defendant used due diligence in ascertaining the whereabouts of Mr. Levine. Had they known about it before the trial the Government's argument would be a lot stronger. They should have investigated as soon as they learned about it. Well, there is a duty of due diligence, how far does the obligation go? How diligent do they have to be?"

Defendant's counsel respectfully points out to the Court that this trial began on November 12th, 1973. The testimony concerning "Jack" was heard on that date for the first time. That evening, being the first day after the government's witness had testified, preparations were made to cross-examine him. After that, a visit to the location where the locksmith shop had been indicated that the store was out of business. The trial lasted for only two further nights. The second day of the trial, November 13th, consisted of the cross-examination of the witness and the introduction of the testimony of the FBI agents. Preparation the second night was necessary to review the testimony of that day and to

prepare for the testimony that was expected on the second count of the indictment. Also to prepare for the testimony to be given by the two defendants and their witnesses. At the end of the third day the entire case was in. The only witnesses expected for the following day were in connection with proof that Carapetyan had lied about not having judgments filed against him. Part of our preparation had included discovering that there had been judgments filed against Carapetyan, which was a direct contradiction to his testimony, and subpoenas were served. However, the Court, under the press of business, ordered trial for an earlier time on the final day. That Morning, November 15th, the Court did offer to the defendant's counsel a continuance in order to permit time for these witnesses to arrive.

Defendant's counsel felt that these witnesses were very collateral to the case at hand in view of the absence of other proof and Mr. Carapetyan's penchant for telling less than the truth. Defendants thereupon rested and did not avail themselves of this continuance.

It would have been presumptuous of the defendant to ask for a general continuance to try and locate a man named "Jack" whose true first name could have been anything

from Jacob to John to Jonathan or some totally unrelated name, whose last name was unknown, whose present occupation was unknown and whose address was also unknown. It is true that the attempt to find "Jack" began in earnest from the first free minute following the trial. There was really no hope that he would be easily located or that he would be located at all.

In spite of this, a door-to-door canvas was made on the very first day that Mc Kibbin and others were available following the trial. Only by the barest coincidence was "Jack" found. Jack Levine testified to that coincidence (Page 23 of the January 18th hearing) when he stated:

> "I went into a store to buy some food and the fellow there that owned it, I knew him for years, I didn't know he owned the store, so he told me that somebody was looking for me."

He indicated that this owner was a person known to him from a totally unrelated set of circumstances, that he had dated this store owner's sister fifteen years earlier, that this person did not own the store when the witness had the locksmith shop in that area and that this friend of many years past advised him of the attempt to locate him. Attorney for defendant would very much like to

puff out his chest and take great pride and credit for the brilliant detective work in locating this witness, but his location and discovery was accomplished with all the subtlety, brilliance and technique that is normally found in a Mack Sennett slapstick comedy.

The only due diligence to which defendant's counsel can point is that an honest attempt was made to locate this witness as quickly as possible after the description of his existence and importance was made known and that but for this honest and diligent attempt, the accidental success would have been impossible.

The government could have had an FBI agent question Mr. Carapetyan even while the balance of the trial commenced. It could have searched locksmith records if other methods failed. It could have blanketted the area with police or, by exercising due diligence, it could have looked into Mr. Carapetyan's personal phone book and discovered with ease what Mc Kibbin's counsel discovered almost by a miracle.

To deny Mc Kibbin a new trial based upon lack of due diligence in discovering and finding Jack Levine would be unfair unless each defendant is allowed to choose up sides with the government, each taking an

equivalent number of government agents and police so that each would have a fair opportunity to find missing and unknown witnesses.

POINT III

THE COURT ERRED IN DENYING A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE SUPPLIED BY JACK LEVINE.

The testimony of Jack Levine must meet the standards for newly discovered evidence in order to justify that a new trial be granted. The Court, in its decision denying the motion, set out those standards when (Page 5) it stated as follows:

> "In United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973), the Second Circuit set forth the following three tests to be applied in determining whether to grant a new trial:
>
> (1) the evidence "must be material to the factual issues at the trial and not merely cumulative and impeaching;"
>
> (2) it "must have been discovered after trial;" and
>
> (3) it must be "of such a character that it would probably produce a different verdict in the event of a retrial."

The Court also pointed out (Page 6) that Kahn further stated:

> "However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can

> be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense.... The same rule applies, even in the absence of intentional suppression if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention.... In each of these instances the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's very." (Emphasis supplied)

The Court also admitted that the first test was met. It is with the Court's determination that the remaining two tests were not met that defendant Mc Kibbin disagrees with.

It was pointed out the Court felt "that the high value of the undisclosed evidence could not have escaped the prosecutor's attention", and that this required that the prosecutor seek out Jack Levine, an easy task since his identity and name were known to Aram Carapetyan.

Defendant's counsel respectfully disagrees with the Court's statement that "Defendants avoided asking the obvious questions that would have identified Jack Levine." The record is clear that defendant's counsel questioned many witnesses, including the wife of a complaining witness whose testimony could have been expected to be far more damaging than anything Levine

might say. If the government had revealed Jack Levine's full name and identity, then there would be merit to this contention that we had avoided finding him or bringing him to Court.

Defendant also disagrees with the Court that he could have asked for a continuance to locate a person only known as "Jack" at the time the defendant's portion of the trial was completed. The Court did agree to grant a continuance for the purpose of allowing witnesses who were known and subpoenaed to Court to testify. This was because the Court had been ordered to convene at an earlier time on the final day of trial than had been its schedule prior thereto. Defendant did not elect to accept the Court's offer of a continuance, which would have been merely in terms of minutes or an hour at most, because the witnesses would impeach Carapetyan only as to a collateral issue.

It may well have been that if the Levine testimony were available or if it would be available at a new trial that this collateral testimony could take on increased importance. The question is how important is the Levine testimony.

Courts are reluctant to set aside a jury

verdict and, where possible, hold that even where a believed witness is impeached by new evidence, that if any other evidence exists that would justify the verdict, no new trial should be granted.

In the instant case it is clear that the only evidence against Mc Kibbin was the testimony of this one witness. Absent a belief in his testimony, no conviction could be sustained. In this regard, and as to whether the testimony of Mr. Levine was vital, I call as my witness the Honorable Judge Mishler who in his discussion following the hearing stated aloud his thinking on the importance of this testimony in connection with the trial. On Page 29 he stated as follows:

> "It's a close question for one reason; that this is a case that's charging extortion and credit. Now, there was some testimony that I got in doubt, full validity, it went in without objection, and that was Mr. Carapetyn testifying that he saw Mr. Mc Kibbin strike somebody with one hand while he was holding the wheel on the other hand. The other overt act that could have been witnessed by anybody else was this one, when Mr. Carapetyn said his nose was bloody, it was done in the presence of Mr. Levine. Now, both those acts of violence in a case could be mutually supporting and then credibility. The other statements that were on the tape, at least the defendant argued that they were all said in jest. I won't say that this was the strangest type of evidence, so I don't agree with the defendant that that was the only

> interpretation to be put on it because there was one statement by one of the defendants that he thought it advisable that Mr. Carapetyn leave town plus Mr. Port said he just gave him that advise, for Mr. Carapetyn's well being, he thought it was warm or cold, I forget which and the other climate was better. It didn't convince me and it probably didn't convince the jury, either. Aside from that it struck in my mind, it was little else that I considered heavy, **weighty.**"

The Judge, on Page 31, then went on to say:

> "This is not the kind of case, in spite of the recordings, in spite of all the evidence of the Government, where the Government case was really airtight or close to it or weighty. It bothers me that this evidence that may very well, may not be, that this evidence may very well be the determinative factor. I get many motions for new trials, I don't recall granting one. This one is the closest that moving parties come to merit."

The attorney for defendant Mc Kibbin respectfully contends that where a trial Judge who has tried a case as fairly and meritoriously as Judge Mishler, and who has paid deep attention to all the witnesses including Jack Levine, finds such a close, close point that this Court should give consideration to that Judge's own musings, particularly when he is apparently concerned about the testimony in connection with Martin Katcher and its admissibility. If it is that close a point, and if the decision was that

razor fine, then it is respectfully contended that a conviction for a Felony should not be permitted to stand on such a minute particle of determination.

The Court, in its decision, finally rested upon conversations within the tape. These conversations, as a reading will indicate, go to the question of payment and the question of amount rather than to threats, which are the necessary element. The Court in its decision stated that the testimony of Carapetyan was not without support in that the tape corroborated testimony that defendant Mc Kibbin increased the indebtedness as a penalty for failing and refusing to pay exorbitant interest rates on the weekly installments. The Court stated that the tape of August 8th "made it clear that failure to pay would result in serious harm to Carapetyn". The tape was thereafter quoted, but nothing in that quote shows such threats.

Even if the tapes did indicate exorbitant interest rates, this would not have justified a verdict of guilty. Again, authority for that interpretation of Section 894 of Title 18 can be found in the charge of the Court (Page 746 of the minutes) wherein he states:

> "The section does not make it a crime to charge usurious interest, no matter how much the interest rate is. It doesn't matter that the loan was not repaid."

Finally, the Court, in discussing charge and summation, indicated that it was proper to advise a jury to consider the facts that statements on a tape wherein the witness is attempting to evince certain responses could be viewed by the jury with a clear propective that the witness is following a script calculated to create forced responses.

CONCLUSION

THE VERDICT OF GUILTY SHOULD BE REVERSED AND A MOTION FOR A NEW TRIAL SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Organized Crime Section
Criminal Division
Federal Building
Room 327-A
35 Tillary Street
Brooklyn, NY 11201
November 2, 1973

Leon R. Port, Esq.
123 Hicks Street
Brooklyn, NY

Re: United States -v- Frank Mc Kibbin - 73 CR 523

Dear Mr. Port:

In fulfillment of agreements arising from our discovery conference on November 1, 1973, I am now providing you with the agreed upon discovery. I would like to note that the Government still firmly objects to your request for discovery of its witness' names.

I would like to note that during our conference, your client and yourself took the opportunity to hear the pertinent tapes in this matter. As I stated during our conference, those two tapes of conversations, on August 4 and August 8, 1972 are the only relevant tapes or other recordings in the possession of the Government.

With respect to Count One, it will be alleged that Mr. Carapetyan borrowed $100.00 from the defendant Mc Kibbin at the Kings Bay Car Service during or about the month of July, 1971. Mr. Carapetyan then began to make weekly "vigorish" repayments at a percentage rate of 5% per week or 260% per annum. These repayments were generally made in or around the above-named car service. Due to Mr. Carapetyan's inability or refusal to make such vigorish payments on certain weeks, the principal sum was arbitiarily increased in increments from the original $100.00 to an ultimate $900.00, despite the fact that Mr. Carapetyan's "vigorish" payments met or exceeded $300.00. Periodically and repeatedly through the course of their dealings, Mr. Mc Kibbin threatened Mr. Carapetyan to continue his payments. These threats were made in and around the vicinity of the Kings Bay Car Service.

With respect to Count Two, the only nickname known to the Government's attorney or investigators, applied to Carl Gross is "Jerry." During or about March and April, 1972, Mr. Mc Kibbin loaned Mr. Gross the sum of $700 in two increments ($300 and $400), at the Kings Bay Car Service, at a 5% per week vigorish or interest rate. During April, 1972 when Carl Gross was unable to make a vigorish repayment he was threatened. Mr. Gross was also threatened in April by a person whom he knew to be associated with Mr. Mc Kibbin. In addition, Mr. Gross was threatened in October, 1972 at his then home. Mr. Gross during March and April, 1972, repaid approximately $100 in vigorish repayments. In October, 1972, after being threatened, Mr. Gross paid Mr. Mc Kibbin $350 on the principal. As stated there are no recorded conversations in connection with the count. In toto, Mr. Gross borrowed $700 at 5% per week and repaid a total $450.

Attached please find copies of Mr. Mc Kibbin's statements (written or recorded) to Government agents.

Mr. Aram Carapetyan first complained to the F.B.I. on July 19, 1972. Mr. Gross was not a complainant. He was interviewed by agents during the course of the investigation.

If I may be of further assistance, please feel free to call upon me.

Yours truly,

David J. Ritchie

DJR:dtj
Enc.

David J. Ritchie
Special Attorney

74 Certificate of Conducting Business as Partners Individual Corporation

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

Business Certificate for Partners

The undersigned do hereby certify that they are conducting or transacting business as members of a partnership under the name or designation of A J [illegible] INTERNATIONAL

at 2101 [illegible] BROOKLYN [illegible]

in the County of KINGS, State of New York, and do further certify that the full names of all the persons conducting or transacting such partnership including the full names of all the partners with the residence address of each such person, and the age of any who may be infants, are as follows:

NAME Specify which are infants and state ages.	RESIDENCE
JACK LEVINE	2330 VOORHIES AVE BKLYN NY
ARAM CARAPETYAN	1503 E. 14 ST. BKLYN N.Y.

WE DO FURTHER CERTIFY that we are the successors in interest to

the person or persons heretofore using such name or names to carry on or conduct or transact business.

In Witness Whereof, We have this 14 day of JAN 19 71 made and signed this certificate.

Jack Levine

Aram Carapetyan

TWO(2)

Service of ~~three~~ (3) copies of the within is hereby admitted

this day of

.....

Attorney(s) for

2 copies received
[illegible]
[illegible]